

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RONALD WHEELER	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
	:	
JAMES MORGAN, ET AL.	:	NO. 96-7820

M E M O R A N D U M

Padova, J.

October , 1999

Petitioner, Ronald Wheeler, a state prisoner at the State Correctional Institution-Smithfield at Huntingdon, Pennsylvania, filed a Petition for a Writ of Habeas Corpus (“Petition”) pursuant to 28 U.S.C.A. §2254 (West 1994). In accordance with 28 U.S.C.A. § 636(b)(1)(B) (West 1993) and Local Rule of Civil Procedure 72.1, this Court referred the Petition to United States Magistrate Judge James R. Melinson for a Report and Recommendation (“Report”). Chief Magistrate Judge Melinson recommended that the Court dismiss the Petition, and Petitioner filed objections. For the following reasons, I will overrule Petitioner's objections, adopt the Chief Magistrate Judge’s Report, and dismiss the Petition for a writ of habeas corpus.

I. FACTUAL BACKGROUND

On April 28, 1983, a jury convicted Petitioner of first degree murder in the Court of Common Pleas of Bucks County. Subsequently, the court sentenced him to death. On direct appeal, the Supreme Court of Pennsylvania affirmed Petitioner’s conviction, but vacated the death sentence and remanded the case to the trial court for the imposition of a life sentence.

Petitioner next filed a PCRA petition which the PCRA court ultimately denied. This ruling was affirmed by the Superior Court and Wheeler’s petition for an allowance of appeal was

denied by the Supreme Court of Pennsylvania.

On September 10, 1996, Petitioner filed his initial petition for a writ of habeas corpus. In a Report and Recommendation of April 30, 1997, Chief Magistrate Judge Melinson recommended dismissal of the petition as untimely, but Petitioner's objections were sustained by the Court. On further consideration of the petition, Magistrate Judge Melinson recommended dismissal without prejudice for failure to exhaust state remedies, because the petition contained a mixture of exhausted and unexhausted claims. Petitioner filed an amended petition August 24, 1998, withdrawing his unexhausted claims.

The amended petition contains eleven claims. Eight of these claims allege ineffectiveness of trial counsel and one claim alleges ineffectiveness of appellate counsel, in violation of Petitioner's Sixth and Fourteenth Amendment rights. The petition also contains one claim of prosecutorial misconduct and one claim of trial court error in violation of Petitioner's due process right to a fair trial.

Upon this Court's request, Chief Magistrate Judge Melinson issued a Report and Recommendation on April 27, 1999. The Magistrate Judge recommends dismissing the claims and denying the petition. Petitioner objects to these recommendations.

II. STANDARD OF REVIEW

"[A] district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2254(a). Where a habeas petition has been referred to a magistrate judge for a Report and Recommendation, the district court "shall make a de novo determination of those portions of the

report or specified proposed findings or recommendations to which objection is made. . . . [The Court] may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C.A. § 636(b).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), P.L. 104-132, 110 Stat. 1214, made numerous changes to Title 28, Chapter 153 of the United States Code, 28 U.S.C. §§ 2241-2255, the chapter governing federal habeas petitions. Section 2254(d)(1), as amended by AEDPA, provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States....

28 U.S.C.A. § 2254(d)(1) (West 1996). A habeas writ should not be granted "unless the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent." Matteo v. Superintendent Scialbion, 171 F.3d 877, 890 (3d Cir. 1999).

III. DISCUSSION

Petitioner makes eleven claims in his habeas petition. These claims fall into three broad categories. Ineffective assistance of counsel comprises the largest category, including eight claims of ineffectiveness of trial counsel and one of ineffectiveness of appellate counsel. In addition, there is one claim of prosecutorial misconduct and one claim of trial court error that Petitioner alleges reach constitutional proportions.

The Court will look at each claim in turn to explain why it agrees with the Magistrate Judge's conclusions that all claims should be dismissed. In his objections, however, the

Petitioner contends that a claim-by-claim review of his petition is inadequate. He insists that the “cumulative effect” of all his claims add up to constitutionally significant violations of his Sixth and Fourteenth Amendment rights. Because this argument pervades Petitioner’s objections, and because once it has been debunked Petitioner’s remaining arguments lose strength, the Court will address it first.

Petitioner cites a United States Court of Appeals for the Ninth Circuit opinion in support of his contention regarding the cumulative impact of multiple deficiencies. Harris v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995). The Harris Court found that counsel made “numerous” clear errors, the cumulative effect of which violated Petitioner’s constitutionally protected right to counsel. The court found this cumulative effect so compelling that a claim-by-claim review was unnecessary. Id. But such a compelling cumulative effect is far from apparent in the instant case. Rather, the Petitioner’s claims individually are without merit. Thus, the cumulative effect of numerous meritless claims is that the Petition as a whole also is without merit.

A. Ineffective Assistance of Counsel

Petitioner lumps together his ineffectiveness of counsel claims as violations of both his Sixth and Fourteenth Amendment rights. Both Sixth and Fourteenth Amendment concerns were addressed in the applicable precedent regarding constitutionally ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). In announcing what has come to be known as the Strickland test, the Court recognized that “[t]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” 466 U.S. at 686, 104 S.Ct. at 2064. The Strickland test has two prongs. First, the defendant must show that counsel’s performance was deficient. This requires showing that

counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. 466 U.S. at 687, 104 S.Ct. at 2064. Strickland further specifies that “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. 466 U.S. at 694, 104 S.Ct. at 2068.

1. Failure to Insure an Impartial Jury

Petitioner contends that counsel was ineffective for not re-examining three jurors after a prospective juror disclosed that some conversation about the pending case had occurred in the jury room. This conversation took place during voir dire before a jury was empaneled. Because the prospective juror asserted that this conversation influenced his judgment about the case, this juror was excused from serving. Defense then moved for a mistrial, and the court denied this motion. The trial court did grant counsel the opportunity to re-examine the three jurors already chosen to see what effect the conversation might have had on them, but counsel chose not to do so. The Pennsylvania Supreme Court held on appeal that counsel was not ineffective for failing to re-examine these jurors, and Magistrate Judge Melinson agreed in his Report.

Petitioner objects to this conclusion, citing Virgin Islands v. Weatherwax, 20 F.3d 572, 580 (3d Cir. 1994) for the proposition that “when absence of [sic] prejudice is due to the failure to conduct an adequate inquiry, prejudice is to be presumed.” (Objections at 7). Petitioner ignores, however, a critical distinction between Weatherwax and the instant case. In Weatherwax, after an empaneled juror brought a newspaper description of the previous days’ trial testimony into the jury room in the midst of the trial, trial counsel failed to voir dire the jury

to see whether this event, occurring as it had subsequent to the empaneling of the jury, had an impact on the jury's impartiality. Weatherwax, 20 F.3d at 579. In the instant case, the conversation in question took place before the three jurors were selected, and before they were questioned about their ability to decide the case impartially. Therefore these jurors were examined adequately, and no prejudice may be presumed. Thus Petitioner's claim that counsel was ineffective for failing to insure an impartial jury fails.

2. Failure to Request Limiting Instructions

Petitioner objects that counsel either had no strategy at all, or at best constitutionally deficient strategy in not requesting limiting instructions regarding testimony from several witnesses about prior incarcerations. Petitioner takes issue with counsel's explanation that since the court had already rejected his motion in limine to prevent introduction of this evidence, counsel wanted to prevent focusing attention of the jurors on the matter. Petitioner then argues that this strategy could not possibly be reasonable because "the prior incarceration was for murder." (Objections at 8). However, when one witness mentioned a previous "homicide charge," counsel immediately objected and the trial judge admonished the jury to disregard that testimony. (Report at 8). Thus counsel's performance regarding the revelation of the homicide charge was appropriate, and his strategy regarding the other evidence cannot be deemed unreasonable under Strickland. The Court therefore dismisses this claim of ineffectiveness of counsel for failure to request limiting instructions.

3. Failure to Conduct Adequate Cross-Examination of Witnesses

Petitioner claims ineffectiveness of counsel for inadequate cross-examination of three witnesses. This claim was rejected as without merit by the state court and by Magistrate Judge Melinson. Petitioner objects that counsel should have impeached one witness' testimony with

inconsistencies in the witness' identification of Petitioner at a preliminary hearing, an identification that counsel had already successfully suppressed. While counsel's strategy not to do so was based on avoiding any chance of opening the door to the introduction of the already suppressed identification, Petitioner insists counsel erred because the court could have prescreened potential impeachment testimony to avoid prejudice. U.S. v. Peterman, 841 F.2d 1474, 1481 (11th Cir. 1988). Peterman, however, involved deleting any reference to a co-defendant in questioning the other defendant about prior convictions. There is little reason to assume the court in the instant case would see a similar need to delete any reference to the pre-trial identification. Petitioner insists the court could have separated out the witness' pre-trial identification of him and her description of the gunman given in the same testimony, and that it would have suppressed the former even in light of impeachment based on the latter. Basing an ineffectiveness of counsel claim on such a string of assumptions, negating the professional judgment of counsel on these matters, would be entirely contrary to the Strickland standard. Petitioner further argues that the cumulative effect of counsel's ineffective cross-examinations amount to a due process violation. The Court, however, agrees with Magistrate Judge Melinson that these claims individually are groundless, and therefore they also are cumulatively groundless.

4. Failure to Introduce Prior Consistent Statements of Defense Witness

Petitioner objects that the Magistrate Judge considered only the issue of the prior consistent statement of one witness and mistakenly concluded that other prior consistent statement claims were withdrawn when Petitioner agreed to file an amended Petition including only unexhausted claims. The AEDPA confers upon the district court the authority to deny a habeas petition on the merits despite the Petitioner's failure to exhaust state remedies. Lambert

v. Blackwell, 134 F.3d 506, 514 (3d Cir. 1997). Considering the merits of this claim regarding each witness, the Court finds that counsel made strategic decisions in his questioning, and thus this claim of ineffectiveness of counsel satisfies neither prong of the Strickland test. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. Petitioner cites no case law to show that the state court's adjudication of this claim was contrary to the Strickland precedent, and thus he fails to meet his Matteo burden. Matteo, 171 F.3d at 888. The Court therefore finds the claim of ineffective assistance for failure to introduce prior consistent statements without merit.

5. Failure to Present Witness

Petitioner contends that counsel was ineffective for not calling William Valentine as a defense witness, despite Valentine having provided the police with a letter allegedly authored by Petitioner that contained a death threat against the victim. Petitioner insists Valentine would have testified that the letter was forged. Counsel explained in evidentiary hearings in state court that he decided not to present Valentine because he determined that this witness' credibility problems would damage Petitioner on cross-examination. Commonwealth v. Wheeler, Nos. 4849/82, 4849-01/82 (Bucks C.C.P., Oct. 22, 1984, N.T. 61-62).

Petitioner cites United States v. Gray in support of his argument that counsel should have done further investigation to determine whether Valentine's testimony would have been helpful. United States v. Gray, 878 F.2d 702 (3d Cir. 1989). In so doing, Petitioner ignores language in Gray which underlines the wide range of reasonable professional judgment courts allow in order to prevent "illegitimate second-guessing of counsel's strategic decisions from the superior vantage point of hindsight." Gray, 878 F.2d at 711 (quoting Strickland, 466 U.S. at 689, 104 S.Ct. at 2065). The Gray Court made it clear that this deferential standard of appraising counsel's efforts means that strategic decisions will rarely be judged deficient retrospectively. Id.

Counsel's decision-making process regarding the decision not to present Valentine clearly falls within the range of acceptable professional judgment. Thus Gray does not provide a constitutional imperative to controvert the state courts' handling of this claim. This Court agrees that counsel was not constitutionally ineffective for failure to present this defense witness.

6. Failure to Conduct an Adequate Investigation

Petitioner reiterates his use of Gray to argue that counsel was deficient for not conducting further investigation of evidence and witnesses. The Court agrees with the Magistrate Judge and the Pennsylvania Supreme Court that counsel's performance reflected decisions well within the realm of acceptable professional judgment,¹ and therefore conformed to the Strickland standard as discussed in Gray. Id. This claim therefore is without merit.

7. Failure to Effectively Examine Witness

Petitioner claims counsel ineffectively examined a former public defender about deals the District Attorney allegedly offered prisoners in return for testifying against the Petitioner. Counsel did elicit some testimony about assistance with parole requests received by two prisoners in return for cooperation, but Petitioner focuses on counsel's failure to elicit further information regarding a specific conversation with the District Attorney. As the Gray Court realized, while retrospective examination of every attorney omission will always reveal that

¹One of Petitioner's claims of ineffective assistance for inadequate investigation of evidence concerns trial counsel's reliance on the District Attorney's statement regarding the origin of a .357 Magnum that was discovered during the police investigation of the homicide. Magistrate Judge Melinson deemed this claim withdrawn because it had not been presented to the Pennsylvania Supreme Court. (Report at 24 n.6). Considering the merits of this claim, the Court finds that counsel's investigation regarding this weapon was consistent with Strickland and Gray, and not constitutionally ineffective. Counsel indeed questioned the detective about this gun. Commonwealth v. Wheeler, No. 4849/82, 4849-01/82 (Bucks C.C.P., Oct. 15, 1984, N.T. 17-18). To argue retrospectively that he should have done more is precisely the type of second-guessing of counsel's decisions decried in Gray.

certain matters could have been handled differently, few omissions rise to the level of constitutional ineffectiveness. The Court agrees that counsel's questioning of the public defender was consistent with Strickland, and not constitutionally ineffective.

8. Failure to Effectively Deal With Evidence

Petitioner contends counsel was ineffective for "opening the door" to the admission of incriminating letters and then failing to object to their admission. However, counsel explained that since the court rejected his pre-trial motion to suppress these letters his strategy at trial was to downplay the letters. Therefore he refrained from continuously objecting to them. Petitioner's second-guessing of this strategy does not meet the Strickland test for ineffectiveness of counsel. The Court agrees with the conclusions of the Magistrate Judge in dismissing this claim.

9. Appellate Counsel's Failure to File Brief

Petitioner contends that appellate counsel was ineffective for filing a brief on direct appeal solely authored by Petitioner. While the record is unclear about whether Petitioner was indeed the sole author, the state court was clear in finding that the brief was comprehensive, professional, and helpful to the Petitioner. Nevertheless, Petitioner objects to the Magistrate Judge's conclusion that use of this brief did not constitute ineffectiveness of counsel because "mere speculation that counsel would not have made a difference is no substitute for actual appellate advocacy." Penson v. Ohio, 488 U.S. 75, 87, 109 S.Ct. 346, 353 (1988). Petitioner neglects to point out, however, an essential difference between Penson and the instant case. In Penson, Petitioner did not have the benefit of individual representation. On appeal, no one filed a brief specifically on his behalf. The court was forced to consider on his behalf the briefs filed by codefendants. Id. This is quite different from the instant situation, where Petitioner's counsel reviewed the brief pertaining to the Petitioner alone, and decided whether to edit the brief in part

or submit it in its original form. The role taken by Petitioner's counsel is far more active than the absolute absence of appellate advocacy referred to in Penson. Thus the case law cited by Petitioner does not support his argument that the state court finding is contrary to applicable Supreme Court precedent, and this claim must also be dismissed.

B. Prosecutorial Misconduct

Petitioner argues that the State withheld favorable evidence and knowingly used perjured testimony of Jerome Gibson. He claims that the State obtained the cooperation of this witness by promising to drop an attempted murder charge pending against him, and then neglected to disclose this deal to the defense. Petitioner further charges that the witness told the State detective prior to trial that his testimony was false, but the detective threatened him with a longer term of imprisonment if he did not stick with his original account.

The state court, however, rejected this claim of prosecutorial misconduct, finding that the post-trial uncorroborated testimony of this witness who had changed his story several times did not prove that the State knowingly used perjured testimony. Commonwealth v. Wheeler, No. 4849/82, 4849-01/82, at 11 n.6 (Bucks C.C.P. Oct. 2, 1985). Moreover, the court found that the State's failure to disclose the withdrawal of the attempted murder charge was not deliberate. Id. The Pennsylvania Supreme Court agreed with the lower court's findings. Wheeler, 541 A.2d at 736. Factual determinations of the state court must be presumed correct, unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e). The Court agrees with Magistrate Judge Melinson's denial of Petitioner's Motion for an Evidentiary Hearing to further develop this claim of prosecutorial misconduct. In order to warrant such a hearing, Petitioner must show that state court hearings did not fully develop material facts relating to this claim, and that the hearing Petitioner received at the state level was not fair or adequate. Todaro v. Fulcomer, 944 F.2d

1079, 1082-83 (3d Cir. 1991). Petitioner premises his Motion on his failure “to develop the factual basis of a claim in State court proceedings.” 28 U.S.C.A. § 2254(e)(2). The record, however, is replete with documentation showing that the claim of prosecutorial misconduct was fully developed in state court hearings and that the hearing Petitioner received was fair. Thirteen post-verdict hearings were held from July 1984-March 1985 addressing Petitioner’s various claims. At the October 1, 1984 hearing, Petitioner questioned Jerome Gibson extensively. Commonwealth v. Wheeler, Nos. 4849/82, 4849-01/82 (Bucks C.C.P., Oct. 1, 1984, N.T. 91-112). The Petitioner, however, asserts that he should now have the opportunity, at an Evidentiary Hearing, to present the taped testimony of the same witness, given before the Pennsylvania Board of Probation and Parole. (Supplemental Objections at 1-2). Petitioner argues this will show that the State knowingly used perjured testimony. But this is precisely what the witness alleged in the 1984 hearing, and the state court found his testimony unconvincing. Neither this testimony, nor additional testimony Petitioner wishes to present would change the state court’s resolution of the prosecutorial misconduct claim.

In particular, Petitioner wishes to present testimony by Gibson’s counsel about the “deal” to drop the attempted murder charge. As noted, the state court considered this issue and concluded that the prosecution’s failure to disclose the withdrawal of this charge was not deliberate, and, “considering the number of first degree felony charges that were disclosed, was not prejudicial.” Commonwealth v. Wheeler, No. 4849/82, 4849-01/82, at 11 n. 6 (Bucks C.C.P. Oct. 2, 1985). Thus this aspect of the prosecutorial misconduct claim was fully developed in state proceedings. For these reasons, the Court overrules Petitioner’s objections to Magistrate Judge Melinson’s denial of Petitioner’s Motion for an Evidentiary Hearing. For the same reasons, the Court overrules Petitioner’s objections to Magistrate Judge Melinson’s denial of

Petitioner's Motion to Make Additional Findings of Fact.

Petitioner has thus failed to meet his burden in the habeas proceeding to rebut with clear and convincing evidence the state court's resolution of the prosecutorial misconduct claim.² This Court accordingly agrees that the prosecutor's acts could not have so infected the trial as to make the resulting conviction a denial of due process. Greer v. Miller, 483 U.S. 756, 765, 107 S.Ct. 3102, 3109 (1987). Petitioner's claim of prosecutorial misconduct therefore fails.

C. Court's Failure to Suppress In-Court Identification

Finally, the amended petition states that Petitioner was denied a fair trial by virtue of the trial court's failure to suppress an in-court identification. Petitioner contends that because the witness' identification of him at a preliminary hearing was suppressed because of the improperly suggestive nature of the proceeding, the in-court identification also should have been disallowed. The Pennsylvania Supreme Court took a different view, noting that where there is an independent basis for later in-court identification, such identification is permissible. Wheeler, 541 A.2d at 734. Convinced that the witness demonstrated the requisite independent basis for the in-court identification, the Wheeler Court dismissed Petitioner's challenge to the suppression ruling. Id. Petitioner cites no case law to show that the Pennsylvania Supreme Court's ruling is contrary to applicable United States Supreme Court precedent. Matteo, 171 F.3d at 888. This claim therefore is dismissed.

²Two additional issues concerning the prosecutorial misconduct claim raised by Petitioner are procedurally defaulted. As Petitioner acknowledges, these issues were considered waived by the PCRA court because they had not been raised in prior proceedings, and the state court upheld this ruling on appeal. (Objections at 2). Because Petitioner fails to demonstrate cause and prejudice necessary to excuse procedural default in state court, these claims are barred from federal habeas review. Wainwright v. Sykes, 433 U.S. 72, 87, 97 S.Ct. 2497, 2506 (1977). Moreover, the Court agrees with Magistrate Judge Melinson that considering the merits of these claims, the Greer standard for prosecutorial misconduct that violates due process is not met.

For the foregoing reasons, the Court adopts Chief Magistrate Judge Melinson's Report and Recommendation. Accordingly, the Court will deny the instant petition for writ of habeas corpus.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RONALD WHEELER	:	CIVIL ACTION
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	:	
v.	:	
	:	
	:	
JAMES MORGAN, ET AL.	:	NO. 96-7820

ORDER

AND NOW, this day of October, 1999, upon consideration of the Report and Recommendation of Chief United States Magistrate Judge James R. Melinson that the Petition for Writ of Habeas Corpus be Denied (Doc. No. 67) and Petitioner's Objections (Doc. No. 71) and Supplemental Objections (Doc. No. 72) thereto, **IT IS HEREBY ORDERED THAT:**

1. Petitioner's Objections and Supplemental Objections to the Report and Recommendation of Chief Magistrate Judge James R. Melinson are **OVERRULED**;
2. The Report and Recommendation is **APPROVED** and **ADOPTED**;
3. Petitioner's Objections to Chief Magistrate Judge Melinson's Order denying Petitioner's Motion for an Evidentiary Hearing (Doc. No. 74) are **OVERRULED**;

4. Petitioner's Objections to Chief Magistrate Judge Melinson's Order denying Petitioner's Motion to Make Additional Findings of Facts (Doc. No. 65) are **OVERRULED**;
5. The Petition for Writ of Habeas Corpus is **DISMISSED**; and
6. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

John R. Padova, J.